

# EXHIBIT

# 109



## INTRODUCTORY STATEMENT

3 This is an appeal from a denial by the California  
4 Franchise Tax Board of Appellant's tax assessment protest.

5                   The Estate.  Marilyn Monroe died in 1962, a resi-  
6    dent of the State of New York.  Her will was admitted to  
7    probate in the Surrogate Court, County of New York, on  
8    January 14, 1963, and Aaron R. Frosch, a New York resident,  
9    was named as Executor.

10 A Petition For Probate of Foreign Will and For  
11 Ancillary Executor was filed in California on January 17,  
12 1963, alleging the existence in California of certain real  
13 property and incidental personal property. An Order Admitting  
14 Foreign Will to Probate and For Ancillary Executor was entered  
15 in the above proceeding on January 21, 1963, naming Aaron R.  
16 Frosch as ancillary executor. Ancillary Letters Testamentary  
17 were issued to Mr. Frosch on February 26, 1963. The total  
18 appraised value of decedent's estate in California was  
19 \$92,781 in 1963, but the clear market value thereof (after  
20 allowable deductions, the largest of which was a first trust  
21 deed encumbrance on the California real property) was  
22 \$36,144.22.

23 All beneficiaries under decedent's will are non- 23  
24 residents. Until her death in 1970, one beneficiary (en- 24  
25 titled to a lifetime annuity of \$2500 per year) was a 25  
26 resident of California, and, until moving from this State in 26  
27 1966, another beneficiary (entitled to a lifetime annuity of 27  
28 \$5000 per year) resided in California. All other beneficiaries 28  
29 have at all times been nonresidents. 29

1 was filmed entirely in California, while only 10% of "The 1  
2 Misfits" was filmed in this State. Pursuant to agreements 2  
3 between Miss Monroe and United Artists Corporation ("UA"), a 3  
4 Delaware corporation, whose principal place of business is 4  
5 New York City, New York, UA agreed to pay directly to Miss 5  
6 Monroe all compensation for her services in the Films. Apart 6  
7 from fixed compensation paid contemporaneously with the 7  
8 principal photography, UA agreed to pay contingent consider- 8  
9 ation based upon a percentage of the Films' earnings, as and 9  
10 when accruing (the "Percentage Payments"). 10

11 Ever since Miss Monroe's death, all Percentage Pay- 11  
12 ments have been paid to Aaron R. Frosch as executor of Miss 12  
13 Monroe's estate under the New York probate. All these Pay- 13  
14 ments were made wholly within New York, by means of checks 14  
15 drawn by UA's New York offices on New York banks, and at no 15  
16 time was any portion of said moneys paid to or received by 16  
17 any person or entity in California or included in the 17  
18 California ancillary probate estate. 18

19 Because Miss Monroe died a resident of New York, the 19  
20 value at the date of death of her contractual rights to Per- 20  
21 centage Payments under the UA agreements was included in the 21  
22 New York estate for purposes of New York estate taxes, and 22  
23 estate taxes were paid to New York based upon this valuation. 23  
24 Similarly, each post-death Percentage Payment, when received, 24  
25 was included in the New York estate's current income for 25  
26 purposes of New York income tax, and income taxes based upon 26  
27 these amounts were timely paid to the State of New York. 27

28 Even though no portion of the post-death Percentage 28  
29 Payments was ever paid to the California ancillary estate, the 29  
30 Franchise Tax Board ("FTB") seeks to tax these sums in pro- 30  
31 portion to the amount of filming conducted in this State. 31  
32 The FTB's assertions are as follows: 32

Year	Purported Taxable Income*	Tax Assessed	Penalty
1963	\$ 34,569.42	\$ 1,894.86	\$ 473.72
1964	151,893.97	10,107.58	2,526.89
1965	150,651.62	10,020.61	2,505.15
1966	152,013.12	10,115.92	2,528.98
1967	145,600.53	13,830.05	3,457.51
1968	39,709.09	3,240.91	810.23
1969	6,386.94	140.48	35.12
1970	26,227.09	1,892.71	473.18
	<b>TOTAL</b>	<b>\$51,243.12</b>	<b>\$ 9,710.78</b>

## ARGUMENT

18 1. California Is Not Entitled To Tax The Percentage Payments  
19 Because There Is No Statutory Or Regulatory Authority  
20 Permitting Such Taxation.

22 Because the FTB has conceded the estate is a non-  
23 resident of California, it is only entitled to tax specific  
24 types of income from sources within this State. According to  
25 California Revenue and Taxation Code ("R&T") Regs. § 17742-  
26 17745(a)(2).

The FTB has based its assessments upon gross income figures.  
31 If a California tax is determined to be due, Appellant will supply appropriate deductions at such time.  
32

1                   " If the settlor, the fiduciary and the           1  
 2                   beneficiaries are all nonresidents of           2  
 3                   this State, only income from real or           3  
 4                   personal property located in this State           4  
 5                   (see Reg. 17951-54(c)), business car-           5  
 6                   ried on within this State (see Reg.           6  
 7                   17951-54(d)), and intangible personal           7  
 8                   property having a business or taxable           8  
 9                   situs in this State, (see Reg. 17951-           9  
 10                  54(f)) is taxable."                           10

11                  This Regulation governing nonresident estates is more narrow-           11  
 12                  ly restrictive than are the provisions dealing with taxation           12  
 13                  of living nonresidents. Living nonresidents are taxed upon           13  
 14                  all income from sources within this State--not merely those           14  
 15                  specific income items set forth above for estates.\*\* A very           15  
 16                  significant difference between the taxation of nonresident           16  
 17                  estates and individuals is the deletion in the estate provi-           17  
 18                  sions of any reference to personal service income. This           18  
 19                  omission is clearly deliberate because personal service in-           19  
 20                  come of living nonresidents is dealt with in Reg. § 17751-           20  
 21                  54(e), and the above Regulation carefully limits itself to           21  
 22                  Reg. §§ 17751-54(c), 17751-54(d) and 17751-54(f)--a con-           22  
 23                  scious passing over of subsection (e). The reason for this           23  
 24                  deletion was to implement a policy excluding taxation of this           24  
 25                  type of income to nonresident estates. The draftsmen in-           25  
 26                  tended that estates of nonresident decedents be taxed only           26  
 27                  on income generated by the estate itself--i.e., that such           27

28                  \*  
 29                  R&T § 17744 provides for an apportionment of income based           29  
 30                  upon the residence of beneficiaries, and Appellant concedes           30  
 31                  that if the FTB prevails upon this Section 1, this State may           31  
 32                  implement such formula for the years (if any) in which in-           32  
 33                  come was distributable to California resident beneficiaries.           33  
 34                  For simplicity, and because it is Appellant's contention           34  
 35                  under Section 2 below that all claimed taxes in respect of           35  
 36                  the Percentage Payments are offset by a tax credit, the text           36  
 37                  deals with the estate's entire income as if there were no           37  
 38                  California resident beneficiaries.                                   38

39                  \*\* R&T § 17951; Reg. § 17951-54(a)(1).                                   39

1       estates be taxed only on the California-source income       1  
 2       generated by the estate's assets or activities; not on income   2  
 3       created prior to the time the estate was in existence (such   3  
 4       as personal service income of the decedent) which is       4  
 5       passively received by the estate outside of California.       5  
 6       Thus the Percentage Payments, concededly personal service in-   6  
 7       come of Miss Monroe, are not intended by the governing       7  
 8       Regulations to be taxable under California law.       8

9           The FTB has argued that the Percentage Payments are   9  
 10       "income in respect of a decedent" under R&T § 17833 and there- 10  
 11       fore are taxable notwithstanding the limited authority of   11  
 12       Reg. § 17742-45(a)(2). This assertion is based upon the   12  
 13       language of R&T § 17833 which provides that income received   13  
 14       by an estate has the same "character" in the hands of the   14  
 15       estate as it did in the hands of the decedent.\* According   15  
 16       to the FTB, this "character" rule enlarges California's   16  
 17       jurisdiction to tax this particular type of income because,   17  
 18       if Miss Monroe were a living nonresident, the Percentage   18  
 19       Payments would be taxable in this State under Reg. § 17951- 19  
 20       54(e).       20

21           The FTB's attempt to thus add Reg. § 17951-54(e)   21  
 22       to Reg. § 17742-45(a)(2) through the term "character" not   22  
 23       only runs contrary to the deliberate omission of personal   23  
 24   24  
 25       \_\_\_\_\_       25

26       \*  
 27       Sec. 17833. [CHARACTER OF INCOME DETERMINED BY REFERENCE   26  
 28       TO DECEDENT.] The right, described in Section 17831 [income   27  
 29       in respect of a decedent], to receive an amount shall be   28  
 30       treated, in the hands of the estate of the decedent, . . . as   29  
 31       if it had been acquired by the estate . . . in the transaction   30  
 32       in which the right to receive the income was originally de-   31  
 33       rived and the amount includible in gross income under Section   32  
 34       17831 or 17832 [sale of right to income in respect of a de-   33  
 35       cedent] shall be considered in the hands of the estate . . .  
 36       to have the character which it would have had in the hands of   34  
 37       the decedent if the decedent had lived and received such   35  
 38       amount.       36

1 service income from the Regulations dealing with nonresident 1  
 2 estates, but it also fails to recognize the distinction be- 2  
 3 tween two very different issues: (1) Whether the Percentage 3  
 4 Payments are taxable under California law; and, if so, (2) 4  
 5 whether their taxable nature is ordinary income, capital gain, 5  
 6 etc. R&T § 17833 is only designed to deal with the latter of 6  
 7 these issues, and it would require an expansion beyond all 7  
 8 legislative intent and decided authority to interpret the 8  
 9 term "character" as including the former. 9

10 Section 17833 is identical to Internal Revenue Code 10  
 11 ("IRC") § 691(a)(3), while R&T Reg. § 17831-17834(c) 11  
 12 [character of gross income in respect of a decedent] is 12  
 13 identical to IRC Reg. S 1.691(a)-3. Appellant has conducted 13  
 14 an extensive search of the Regulations and legislative 14  
 15 history of R&T § 17833 as well as IRC § 691, and nowhere in 15  
 16 any of these materials is there mention, or indeed even 16  
 17 indication, that the word "character" was ever intended to 17  
 18 encompass "taxability."\* Quite the contrary, the legislative 18  
 19 history of § 691 makes it very clear that the purpose of this 19  
 20 section was entirely different. Under case law before enact- 20  
 21 ment of § 691, income which had accrued prior to the death of 21  
 22 the decedent was valued for estate tax purposes, given a 22  
 23 basis at that value, and then never taken into income when 23  
 24 collected (the collections represented merely a recovery of 24  
 25 basis). Solely to overcome this result, § 691 (formerly 25  
 26 § 42 of the 1934 and 1938 Revenue Acts; § 126 of the 1942 26  
 27 27

28  
 29 \*  
 30 The examples under R&T Reg. § 17831-17834(c), e.g., deal 29  
 31 with capital gains, tax-free governmental interest, and 30  
 32 income averaging. Certainly none of these factors are 31  
 33 relevant to determining the "taxability" of particular amounts; 31  
 34 they are only concerned with the rate of tax based upon the 32  
 35 type or "character" of the income involved. 32

1 Revenue Act) was enacted. 1

2 The distinction between "character" and "taxability" 2  
3 has been recognized by the Franchise Tax Board in its own 3  
4 Legal Ruling No. 291, dated April 23, 1965. Although the 4  
5 problem in this Ruling was somewhat different from the instant 5  
6 case, it was nonetheless quite analogous and the reasoning and 6  
7 policy are the same. 7

8 In L.R. No. 291, the FTB was faced with the question 8  
9 of whether income received by a California resident from 9  
10 intangibles held by a nonresident trust was entitled to a tax 10  
11 credit in this State--if the amounts were from sources within 11  
12 California, no credit was available. In determining that the 12  
13 taxpayer could not claim a credit, the Ruling was careful to 13  
14 delineate the two issues set forth above (source vs. 14  
15 character). The first step in the analysis was to determine 15  
16 whether the income was from sources within California. In 16  
17 holding that it was income, the decision noted that 17  
18 a trust beneficiary is the "owner" of intangibles in the 18  
19 trust, and, accordingly, such intangibles have a situs (and 19  
20 therefore a source) at his residence. Only at that point, 20  
21 i.e., only after deciding that these amounts were indeed from 21  
22 sources within California, did the Ruling take the second 22  
23 step to consider the "character" of the income. Even though 23  
24 R&T § 17752(b) provided that amounts distributed to bene- 24  
25 ficiaries of a trust have the "same character in the hands 25  
26 /// 26  
27 /// 27  
28 /// 28  
29 /// 29  
30 /// 30  
31 /// 31  
32 /// 32

1 of the beneficiary as in the hands of the trust,"\* the 1  
 2 decision explicitly did not base its "taxability" determina- 2  
 3 tion on this "character" language: 3

4 ". . . The rules governing jurisdiction 4  
 5 to tax and the character (conduit) \*\* rule 5  
 6 are entirely separate and distinct and 6  
 7 have no relation to each other. As 7  
 8 stated in Bank of America v. U. S., 23 8  
Fed.Supp. 152 (1962), the conduit theory 9  
 9 should be applied not to find tax 9  
 10 liability, but to determine only the 10  
 11 character of the amounts distributed for 11  
 12 the purposes of assessing taxes after 12  
 13 tax liability has been established." 13  
 14 (emphasis added). 14

15 For the FTB to expand the "character" definition 15  
 16 contained in R&T § 17833 to include "jurisdiction to tax" 16  
 17 would thus contradict its own Ruling and be without authority 17  
 18 in either the law, regulations or legislative history. 18  
 19 Accordingly, the FTB has approached this issue in a manner 19  
 20 directly contrary to the existing precedents, and its analysis 20  
 21 under § 17833 must be reversed: The question of whether the 21  
 22 Percentage Payments are taxable under California law must be 22  
 23 determined before the character rule (ordinary income, 23  
 24 capital gain, etc.) can be considered. 24

25 \* The "character" aspects of § 17752 are virtually identical 25  
 26 to the "character" language of § 17833: 26

27 "Section 17752. (a) Subject to subsection (b), 27  
 28 the amount of income for the taxable year re- 28  
 29 quired to be distributed currently by a trust 29  
 30 described in Section 17751 shall be included 30  
 31 in the gross income of the beneficiaries to 31  
 32 whom the income is required to be distributed, 32  
 whether distributed or not. . . ."

33 " (b) The amounts specified in subsection 33  
 34 (a) shall have the same character in the hands 34  
 35 of the beneficiary as in the hands of the 35  
 36 trust. . . ."

37 § 17833 is set forth in the footnote on page 6, supra. 37

38 \*\* The phrase "conduit rule" refers to the fact that § 17752 38  
 39 causes the character of income to flow through the trust to 39  
 40 the beneficiary. Section 17833 causes the character of in- 40  
 41 come to flow through the decedent to the estate. 41

1 As discussed above, the Percentage Payments are not  
2 taxable in California under existing law because they do not 2  
3 fall within any of the categories prescribed by R&T Reg. 3  
4 S 17742-17745(a)(2). This being so, there is no reason to 4  
5 determine whether the "character" of these amounts is ordinary 5  
6 income, capital gain, etc., and R&T S 17833 never comes into 6  
7 play. To hold otherwise would be to stretch the meaning of 7  
8 a section designed for an entirely different purpose in order 8  
9 to circumvent the clear language of a carefully drawn Regu- 9  
10 lation that deals with the precise question in point. \*

11 By reason of the foregoing, no part of the Percentage  
12 Payments is taxable in California. 12

13 13  
14 14  
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17 17  
18 18  
19 19

21 The unfairness of taxing personal service income paid to  
22 the estate of a nonresident--as well as further evidence that  
23 such income was not intended by the legislature to be taxed--  
24 can be seen in R&T § 17836. According to this section, the  
25 estate is allowed a deduction from income in respect of a  
26 decedent only for California inheritance taxes paid on such  
27 income. [R&T § 17837 defines "inheritance tax" so as to  
28 exclude inheritance taxes paid to foreign states.] But where  
29 the decedent is a nonresident, no inheritance tax is paid in  
30 California on such asset because the estate of a nonresident  
31 is subject to California inheritance tax only on real prop-  
32 erty and tangible personal property located in California.  
33 Thus, under the FTB's analysis, the estates of nonresident  
34 decedents would be subjected to the burden of California  
35 income tax without the possibility of deduction for estate  
36 taxes paid with respect to such income. This would not be  
37 the case if the decedent were a resident, and there is no  
38 reason to assume this unfairness was intended by the legis-  
39 lature--particularly in the absence of clear authority, to  
40 tax these amounts. Quite the contrary, § 17836 is identical  
41 to IRC § 691(c)(1) where, of course, there are no such  
42 peculiar residency problems and the estate is always entitled  
43 to an income tax deduction for estate taxes paid on § 691  
44 income.

2. Even If California Is Entitled To Tax The Percentage  
 2 Payments, It Must Allow A Credit For Taxes Paid To The  
 3 State Of New York.

4

5 To avoid the burden of double taxation, R&T §  
 6 18004(a) allows a California tax credit to estates whose  
 7 income is taxed by two jurisdictions:

8 "If an estate or trust is a resident  
 9 of this State and also a resident of  
 10 another state, it shall, notwithstanding  
 11 the limitations contained in Sections  
 12 18001 and 18002[\*], be allowed a credit  
 13 against taxes imposed by this part for  
 14 net income taxes imposed by and paid  
 15 to the other state, subject to the  
 16 following conditions:

17 "(a) Credit shall be allowed only for  
 18 such proportion of the taxes paid to  
 19 the other state as the income taxable  
 20 under this part and also subject to  
 21 tax in the other state bears to the  
 22 entire income upon which the taxes  
 23 paid to the other state are imposed . . . ."

24 Pursuant to this formula, taxes paid to another state will be  
 25 allowed as a credit against taxes levied in California with  
 26 respect to the same income, and the California tax would be  
 27 proportionately reduced. Indeed, in a case such as the  
 28 instant one (where the foreign state's tax rate exceeds the  
 29 California rate), the tax credit under R&T § 18004(a) will  
 30 totally offset the California assessment.\*\*

24

25

26 \*  
 27 S 18001 and S 18002 deal with restrictions on tax credits  
 28 allowable to residents and nonresidents which are not estates  
 29 or trusts.

28 \*\*

29 The fact that the New York rates exceeded the California  
 30 rates for all years relevant hereto is established by the  
 31 Affidavit of Aaron Frosch, Executor, a copy of which is at-  
 32 tached hereto as Exhibit "A".  
 31 Specific illustrations of the applicability of S  
 32 hereto. 32 hereto.

R&T § 18004(a) is operative when an estate is a "resident" of both this State and another. The determination of residency for estates is not based upon the "minimum contacts" criteria employed for living individuals, but rather is governed by R&T § 18003 which provides that ". . . an estate or trust is a 'resident' of the state which taxes the income of the estate or trust irrespective of whether the income is derived from sources within that state."

It has been suggested by the FTB that the California ancillary estate is not a "resident" within the meaning of R&T § 18003 (and hence is not entitled to the tax credit under R&T § 18004) but this position is based upon interpreting R&T § 18003 in the narrowest possible manner:

1. As noted above, R&T § 18003 provides that an estate is a resident of the state which taxes its income ". . . irrespective of whether the income is derived from sources within that State."
2. According to the FTB, this phrase means that an estate is only a resident of a state which taxes income both from sources within and without the state.
3. By virtue of 1 and 2, the FTB asserts that, because California only taxes income from sources within this state, the domiciliary estate is not a California "resident" within the meaning of § 18003.\*

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\* This position is presumably founded on R&T Reg. § 18003-18004 which provides that: ". . . If an estate or trust is taxable under the law on income from sources both within and without the State, it is a resident of California. If, however, it is taxable only on income from sources within this State, it is a non-resident."

1                   To sustain the FTB's interpretation of § 18003,           1  
 2 one must construe "irrespective of whether such income is           2  
 3 derived from sources within that State" to mean "only if           3  
 4 some part of such income is derived from sources without           4  
 5 that State." Such an interpretation is contrary to the plain           5  
 6 meaning of the word "irrespective." Webster's Seventh New           6  
 7 Collegiate Dictionary defines "irrespective of" as "without           7  
 8 regard to; regardless of." The clear import of "irrespective"           8  
 9 in R&T § 18003 is that, in determining the "residence" of an           9  
 10 estate or trust, it is unimportant whether the income taxed           10  
 11 is from sources within or without the State. If any portion           11  
 12 of an estate's income, regardless of its source, is taxed by           12  
 13 a jurisdiction, the estate will be a "resident" of that           13  
 14 State under R&T § 18003 and entitled to a credit under R&T           14  
 15 § 18004(a).   15

16                   Strong evidence sustaining the correctness of this           16  
 17 interpretation of R&T § 18003 is found in R&T § 18004. That           17  
 18 section provides "If an estate or trust is a resident of           18  
 19 this State and also a resident of another state, it shall,           19  
 20 notwithstanding the limitations contained in R&T §§ 18001           20  
 21 and 18002 be allowed a credit . . ." (emphasis added). Yet           21  
 22 R&T § 18002 deals only with limitations on the availability           22  
 23 of a tax credit to nonresidents. Thus, there would seem to           23  
 24 be only one reason for the legislature to have referred to           24  
 25 this section: While an estate may be considered a                   25  
 26 "nonresident" for purposes of determining what portion, if           26  
 27 any, of its income is to be taxed in California, once any           27  
 28 part of its income is taxed by this State and another State           28  
 29 it is entitled to a tax credit in California. This would           29  
 30 not only seem an equitable rule for the avoidance of double           30  
 31 taxation, but, unless the legislature's reference to R&T §           31  
 32 18002 is merely surplusage, it is compelled by the statute.           32

1           Although R&T § 17032 states that headings should .       1  
2   not be used in interpreting the law, it is nonetheless       2  
3   indicative of the authorities' interpretation that the head-   3  
4   ing of R&T § 18004 both in West's Annotated Code and the   4  
5   Prentice-Hall Tax Reporter states that this section deals   5  
6   with tax credits for an "Estate or Trust Having Both Resident   6  
7   and Non-resident Status" (emphasis added). Again, unless this   7  
8   was an idle act by the legislature, it would seem that the   8  
9   scheme of tax credit under § 18004 envisions precisely the   9  
10   instant situation--an estate which was a "resident" of a   10  
11   foreign state and also taxed upon certain types of income   11  
12   (i.e., as a "nonresident") by California. Moreover,   12  
13   any other interpretation of this heading would be inconsistent   13  
14   with the legislature's reference to § 18002 in the body of   14  
15   § 18004.   15

16           The unfair burden of the FTB's position is readily   16  
17   apparent in the instant case. California did not assert its   17  
18   tax on the Percentage Payments until December of 1971, almost   18  
19   eight years after the first New York taxes were due on this   19  
20   income. The estate would presumably have been entitled to a   20  
21   New York credit for California income taxes if it had paid   21  
22   the California taxes when the New York returns were filed,   22  
23   but by the time of California's assertion the New York returns   23  
24   had long since been filed and the period within which to apply   24  
25   for a New York refund had expired. Accordingly, if the FTB's   25  
26   position is sustained, the estate will have paid taxes to   26  
27   two states on the same income with no possibility of a tax   27  
28   credit.   28

29           By reason of the foregoing, if, contrary to       29  
30   Appellant's assertion, the Percentage Payments are held to   30  
31   constitute taxable income, California must nonetheless allow   31  
32   a credit for taxes paid to the State of New York.           32

1 3. Even If No Credit Is Allowable, The Penalty Should Be 1  
 2 Waived. 2

3 R&T § 25931 allows relief from the California 3  
 4 penalty in the event "the failure is due to reasonable cause" 4  
 5 and not due to wilful neglect. . . ." Appellant's basic 5  
 6 position is that no income tax is due as claimed by the FTB; 6  
 7 and if Appellant is successful, the penalty and interest will 7  
 8 abate automatically. Yet, even if Appellant should fail in 8  
 9 its position of "no tax due," relief from the penalty should 9  
 10 nevertheless be allowed. 10

11 The instant case is one of first impression on both 11  
 12 the question of taxability and credit, and Appellant is aware 12  
 13 of no authority other than as set forth herein which would 13  
 14 guide a determination of these issues. The Executor, an 14  
 15 attorney in the State of New York, has at all times believed 15  
 16 in good faith that no tax was due the State of California by 16  
 17 reason of the Percentage Payments, and Appellant's failure to 17  
 18 pay California taxes was based upon this understanding. 18  
 19 Because of the difficulty in resolving these problems, and 19  
 20 indeed the impossibility for either Appellant or the FTB to 20  
 21 have come to conclusions with certainty, Appellant respectfully 21  
 22 asks that, if it is finally determined a tax is due, the 22  
 23 non-payment penalty be waived. 23

24 Authority that uncertainty in the law excuses the 24  
 25 non-payment payment penalty may be found in FTB Legal Ruling 25  
 26 No. 105, December 5, 1958. In that instance, the FTB ruled 26

27 "The law affixes no standard as to what 27  
 28 will constitute 'reasonable cause' for 28  
 29 this purpose [waiver of penalty]. . . . 29  
 30 The Courts have ruled that reasonable 30  
 31 cause means nothing more than the exercise 31  
 32 of ordinary business care and 32  
 33 prudence; that the mere failure to comply 33  
 34 with provisions of revenue laws is not 34  
 35 a per se 'without reasonable cause' 35

1 violation; that it is well settled that 1  
2 in the application of penalties, all 2  
3 questions of doubt must be resolved in 3  
4 favor of those from whom the penalty is 4  
5 sought; that it is not the purpose of the 5  
6 law to penalize frank differences of 6  
7 opinion. . . . [A] reasonable cause 7  
8 excusing the failure to file a return 8  
9 may exist where the belief that no return 9  
10 was required is based on adequate grounds. 10  
11 Misunderstanding due to reasonable doubt 11  
12 as to whether a return is required in 12  
13 view of conflicting rulings or decisions, 13  
14 or ambiguities in the law may be an 14  
15 acceptable excuse." (Emphasis added.) 15

9 See also Palm Beach Trust Co. v. Com'r, 174 F.2d 527 (D.C. 9  
10 Cir. 1949), rev'd 9 TC 1060, cert. den. 338 U.S. 825. 10

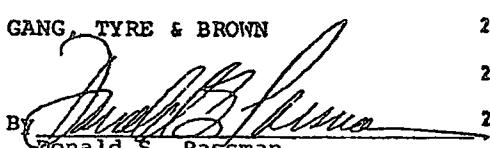
11  
12 CONCLUSION 12  
13

14 As set forth more fully above, Appellant respectfully 14  
15 asserts that the Percentage Payments are not taxable by the 15  
16 State of California. Moreover, even if these amounts are held 16  
17 to be so taxable, California must allow a tax credit under R&T 17  
18 § 18004 which would totally offset the taxes for each of the 18  
19 years in question. If a tax is found to be due, in light of 19  
20 the fact that Appellant has acted upon a good faith interpre- 20  
21 tation of the law, Appellant requests that the penalty for 21  
22 failure to file returns be waived. 22

23 Dated: December 7, 1972. 23

24 Respectfully submitted, 24

25 GANG, TYRE & BROWN 25

26   
27 By: Donald S. Passman 27  
28 Attorneys for Appellant 28

29  
30  
31  
32

FRANCHISE TAX BOARD  
STATE OF CALIFORNIA

ESTATE OF MARILYN MONROE,  
DECEASED, ) AFFIDAVIT OF  
Federal Employer I.D. No. 136129486 ) AARON R. FROSCH

STATE OF NEW YORK }  
COUNTY OF NEW YORK } SS.

I, AARON R. FROSCH, being duly sworn, depose and say:

1. I am an attorney at law duly licensed to practice in the State of New York, and I am now, and at all times have been, the sole executor of the domiciliary Estate of Marilyn Monroe, Deceased, in New York ("the Estate").

2. I am familiar with the Estate's New York State Fiduciary Income Tax Returns for the years 1963 to the present, inclusive, and all such returns were filed over my signature. True and accurate copies of the returns for 1963 through 1970, inclusive, are attached hereto marked Exhibit A, Items 1 through 8.

3. In each of the years 1963 through 1970, inclusive, the gross income figure on the Estate's New York Fiduciary Income Tax Returns (and, more specifically, the item entitled "other income" in Schedule 5, line 9 of the 1963 through 1966 returns, and in Schedule 5, line 8 of the 1967 through 1970 returns) included all sums derived from the motion pictures entitled "The Misfits" and "Some Like It Hot" which were paid to the Estate. Accordingly, the income taxes based upon such amounts were paid to the State of New York, as set forth in these returns.

4. Exhibit B attached to this Affidavit is a true and accurate statement of the New York State Income Tax rates applicable to the Estate for the years in question.

Dated January 7, 1972, New York, New York.

**Notarization:**

Aaron R. Frosch